In the United States Circuit Court of Appeals for the Ninth Circuit

THE UNITED STATES OF AMERICA,
Appellant,

vs.

TOMMY PAYNE,
Appellee.

No. 3897

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HON. EDWARD E. CUSHMAN, *Judge*

Brief of Appellee

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STATEMENT

This suit was brought by Appellee, a full blood Quileute Indian, who resides with his family in the Indian village situate on the small reservation at the mouth of the Quileute River in Clallam County, Washington.

About ten years ago the President had caused the Quinaielt Reservation to be surveyed and opened for allotment to the Quinaielt and Quileute Indians for whom this reservation had been set apart and selected by the United States under the provisions of the treaty made with Governor Isaac I. Stevens, July 1, 1855, and January 25, 1856. (12 Stats. 971), and directed by special statute of March 4, 1911, 36 Stat. 1345.

The petition was filed and decree rendered and properly certified as provided by Act of March 3, 1887, 24 Stats. 505, as amended by Act of February 6, 1901, 31 Stats. 760.

The treaty made with these Indians provides:

> "There shall, however, be reserved for the USE and OCCUPATION of the tribes and bands aforesaid, a TRACT or TRACTS of land sufficient for their wants * * * to be selected by the President of the United States and hereafter surveyed or located and set apart for THEIR EXCLUSIVE USE."

It is admitted in the answer filed that for about nine years after Appellee had made his selection of the land from the lawfully appointed and acting agent, he had been excluded from and prevented from going upon and occupying it as a home for himself and family by Appellee.

The only excuse for withholding this land from Appellee is the claim that it is more valuable for timber than for agricultural or grazing purposes.

The Court sustained a demurrer to the affirmative defense. At the trial the Court permitted a letter of a government employee, to the effect that the land was more valuable for timber than for agriculture or grazing purposes, to be introduced in evidence. This evidence was admitted to permit Appellant to make a record.

In this letter it was further stated:

> "In this connection it can also be said that there are but very few allotments already made on this reservation on which the timber value is not greatly in excess of any value that can be credited to the land."

It should be kept in mind that this reservation, which was to be for the SOLE USE and OCCUPATION of these Indians was not defined in the treaty, but later selected by the President, and probably without suggestions from them.

ARGUMENT

Common justice would suggest that a guardian (the United States), having selected these lands for its wards (these Indians) is estopped from asserting that the very lands which it has selected for

their sole use and occupation is not suitable for their use and occupation.

Thus at the threshhold of its appeal the Government is met with a universally recognized and adhered to rule of law based upon common sense and justice, that a guardian, at least in dealing with a ward, is bound by its act and deed, and will not be heard in a court of equity to repudiate its deliberate acts.

If it was contended that some great wrong would or might come to the ward by a wrongful or improvident selection hastily or inadvertently made, some possible excuse might be offered, but in this case the ward is denied the right to land for a home for sixty-six years after the treaty, nine years after the allotment is selected, forsooth, because after these long years the timber upon it has become more valuable than the land would be with such timber removed.

Appellant has cited no authority to justify denying this Indian the rights to the land.

It is the undisputed evidence that thirty acres of the land is not timbered, but rich bottom land covered only with brush, and that it will all be good agricultural land after the timber is removed.

The great majority of the farms in Western Washington have been carved out of heavily timbered lands. Very few of them had as large proportion as this tract of brush land, comparatively easily cleared.

It is not desired, however, that the decree in this case be affirmed upon the sole ground that this tract is nearly half open land, but because Appellee is entitled to the land with rights dating from the time it was selected by him.

Appellee is clearly entitled to the allotment selected, both under the treaty (which was signed by his father, Tah-ah-he-whitl); under the general Act, February 8, 1887, 24 Stats. 388, amended February 28, 1891, and June 25, 1910, 36 Stats. 859, and special Act March 4, 1911, 36 Stats. 1345.

The alloting act provides that allotments shall be selected by the Indians. Appellee made his selection of this land. It further provides:

> "The allotments provided for in this Act shall be made by special agents appointed by the President for such purpose, and the superintendents or agents in charge of the respective reservations on which the allotments are directed to be made, or in the discretion of the Secretary of the Interior, such allotments may be made by the superintendent or agent in

> charge of such reservation under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such special alloting agents, superintendents or agents to the Commissioner of Indian Affairs in duplicate, one copy to be retained in the Indian Office, and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office."

The special Act of March 4, 1911, 36 Stat. 1345, provides:

> "That the Secretary of the Interior be and he is hereby authorized and DIRECTED to make allotments on the Quinaielt Reservation, Washington, under the provision of the allotment laws of the United States to all members of the Hoh, QUILEUTE, Ozette, or other tribes of Indians in Western Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of July 1, 1855, and January 23, 1856, and who may elect to take allotments on the Quinaielt reservation rather than on the reservation set aside for these tribes; Provided, that the allotments authorized herein shall be made from the surplus lands on the Quinaielt Reservation after the allotments to the Indians thereon have been completed."

The evidence is conclusive and uncontradicted that the President exercised his discretion to have the lands surveyed and allotted in severalty; that Frank Archer was appointed special allotting agent to make the allotments upon this reservation; that

Appellee made his selection of the lands in question by applying to Mr. Archer, and it was marked on the alloting lists and set apart to him; that all, or practically all, of the Quinaielt Indians have received their allotments, but that Appellee and the Quileute Indians who have as much right to allotments as the Quinaielt Indians have been excluded and denied the right to occupy the lands selected by them, the only excuse for excluding him and other Quileutes being that the land is now more valuable for timber than for agriculture and grazing.

The land is clearly within the statute which permits agricultural and grazing lands to be allotted. There are no qualifications or restrictions upon the character of land to be allotted under the treaty, or under the special Act of March 4, 1911 directing that these allotments be made.

It is no reason for excluding Appellee that the lands which are valuable for agriculture and grazing are also valuable or more valuable for timber than for agriculture.

The policy of the Government should be to encourage the Indians to obtain homes upon the reservation and to use and cultivate the ground.

The statute under which the suit is brought is

very broad, 31 Stat. 760. It provides:

> "That all persons who are in whole or in part of Indian blood or descent who are ENTITLED to an allotment of land under any law of Congress or who *claim to be so entitled* to land under any allotment act or under any grant made by Congress, or who claim *to have been unlawfully denied* or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress may commence and prosecute or defend any action, suit or proceeding in relation to their right thereto in the proper circuit court of the United States, and said courts are hereby given jurisdiction to try and determine any action, suit or proceeding arising within their respective jurisdictions involving the right of any person in whole or in part of Indian blood or descent to any allotment of land under any law or *treaty* * * * , and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect when properly certified to the Secretary of the Interior AS IF SUCH ALLOTMENT HAD BEEN ALLOWED and approved by him."

By this statute it is made the duty of the courts to hear and determine all claims of Indians who claim the right to an allotment under any law or treaty or who claim to have been wrongfully excluded from having an allotment.

Appellee, as stated, did all he could do and all he was required to do to obtain this allotment and for approximately nine years he has been excluded,

not because he was not entitled to it by right; not because the President had not exercised his discretion to act; not because the land was not available and suitable for agriculture as soon as the brush was removed from thirty acres and the timber from the remainder, but solely upon the excuse that the timber upon this land is now of more value than the value of the land for agricultural purposes.

No cases are cited which hold an Indian can be denied lawful rights because those rights are valuable and entitle him to valuable property, and why should this guardian seek to deprive his ward of valuable property? Appellant's brief suggests no answer to this pertinent question.

The late General Hazard Stevens, in his History of the life of his father, and who was present when most of the Washington and Oregon treaties were made, writes of the promises made by his father to induce the Indians to sign.

At page 463 of the History he quotes his father as having told the Indians: "We want to place you in homes where you can cultivate the soil, raising potatoes and other articles of food, and where you may be able to pass in canoes over the waters of the Sound * * *. The Great Father desires this,

and this is why I am able to say this, the Great Father thinks you ought to have homes and he wants you to have a school. Those white children have always told you you would be paid for your lands, and we are here now to buy them."

At the Point No Point treaty he told them, Vol. 1, page 469: "The Great Father wants you and the Whites to be friends; he wants you to have a house of your own, to have a school where your children can learn. He wants you to learn to farm, to learn to use tools * * * This you will have all the time and when the PAPER COMES FROM THE GREAT FATHER, THEN YOU WILL HAVE YOUR OWN houses and homes and schools."

At page 472: "The Governor addressed them, pointing out THAT THE TREATY GAVE THEM ALL THOSE THINGS that a father would give his children, as homes, schools, medicines and a doctor."

At the Medicine Creek Treaty, (page 458), Governor Stevens told them: "You will have certain lands set apart for your homes."

It is reasonable to suppose the same or similar promises were made to the Quileutes at the time their treaty was negotiated.

The treaty was interpreted to these Indians in Chinook jargon (a very imperfect means of communicating any but the most simple transactions and thoughts). It provides, (12 Stat. 971), Art. 6:

> "The President may further at his descretion cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable."

The sixth paragraph of the Omaha treaty provides for an allotment of eighty acres to an individual and more to families according to the number of family members, and for issuing patents to the allottees. (10 Stat. 1043.)

In the case of *Seufert Bros. Co. vs. U. S.,* 249 U. S. 194, 63 L. Ed. 555, the Supreme Court quoted with approval from *United States vs. Winans,* 198 U. S. 371, 49 L. Ed. 1089, as follows:

> "We will construe a treaty with the Indians as 'that unlettered people' understood it, and as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection, 'and coun-

> terpoise the inequality' by the superior justice which look only to substance of the right without regard to technical rules. *Choctaw Nation vs. U. S.* 119 U. S. 1, 30 L. Ed. 306; *Jones vs. Meehan,* 175 U. S. 1, 44 L. Ed. 49."

Referring to the *Kansas Indians,* 72 U. S. 737, 18 L. Ed. 667, the Supreme Court said:

> "If they have outlived many things they have not outlived the protection afforded by the Constitution, treaties and laws of Congress."

Viewing the sixth article of the treaty with this light of this reliable history there can be no doubt that the Indians understood the word "may" as "will", in the sixth article, and that it was a positive promise that lands *would* be assigned them sufficient for their homes and needs.

There is no merit in Appellant's contention that the lands are not adapted to agriculture and grazing, because they are in part covered with timber. This contention is disproved by thousands of Western Washington and Oregon farms that were once heavily timbered. This is true more or less through the Eastern and Southern states. Lands once timbered are now producing farms.

It is pertinent to ask why was any provision made in the treaty or statute for allotments at all,

if the reservation selected was all timbered and timber land was not to be allotted.

It is argued in Appellant's brief there is no affirmative showing that the President has decided that this "particular tract" herein in issue, has been surveyed in accordance with the terms of the statute, or "that lands embraced within the reservation could be advantageously used for agriculture or grazing purposes."

Appellee testified, (R. 34):

> "The Quinaielt Reservation was surveyed about twelve years ago, after which he selected his allotment. * * * Mr. Archer at that time was the allotting agent. Mr. Archer instructed his assistant to go and see the plaintiff together with the rest of the people that were entitled to an allotment, and they (he) showed plaintiff MAPS and LOCATIONS of WHERE THERE WAS GOOD LANDS FOR AGRICULTURAL PURPOSES. That is how he (plaintiff) got it."

This evidence is uncontradicted and covers every point suggested in Appellant's brief: that the President had theretofore had the lands surveyed, had opened it for allotments, had appointed a special allotting agent, had selected portions of the reservation that was suitable for agriculture, and that the representative of the President, appointed for the purpose, assisted Appellee in selecting his allotment.

It would seem this is a proper case to apply the rule announced in *Choctaw Nation vs. U. S., supra,* and to "counterpoise the inequality by the superior justice which looks only to substance and the right, without regard to technical rules."

The claim that the land is not suitable for agriculture is contrary to the evidence. The evidence introduced by Appellant, (R. 49), is as follows:

> "About 30 acres of the land consists of level and fairly rich bottom which would if cleared make good farm land. The balance (50 acres) consists of rolly bench and side hill slope to the higher land back from the river, and would if cleared make grazing and possibly farm land."

Appellee testified, (R. 36):

> "Plaintiff feels sure he can support his family if given the right to that land; that both white people and Indians along the Queets River are making a good living today out of their farms, * * * about six miles from the land plaintiff selected."

Jack Ward, Appellee's witness, testified (R. 38):

> "The land (selected) is the same as around the Queets country where the farmers live; that he would say pretty near one-half of that selection was good for agricultural land, and the other half toward the hill is timber, and if the timber were removed would be about the right kind of land for agriculture and grazing. * * The Indians (in the Queets country, six miles away) have cleared their land and live on it and make a living there. * * * There are

> about eight Indian families and right across the river there are over twenty white families. One farmer (white) has about 40 head of cattle and has cleared about sixty acres of his ranch. * * * Most of those lands in that valley were just like the one Mr. Payne selected and now they have big farms out of it."

The decision of the Circuit Court of Appeals in *Leecy vs. U. S.,* 190 Fed. 289, is on all fours with this case. The appeal of that case was dismissed upon motion of the Attorney General in the Supreme Court, 232 U. S. 732, 58 L. Ed. 818. In that case a section of land, part of the Mille Lac Indian reservation, was withdrawn by order of the Secretary of the Interior from allotment in order that the timber upon it could be cut, the lumber to be used to build houses for the Indians. Thereafter Mrs. Leecy selected a part of the land so withdrawn for an additional allotment. The Circuit Court decided the Secretary's action in withdrawing the land until the timber could be removed was without authority of law and invalid. At page 292, the Court says:

> "Congress authorized the allotment of these lands, and if the Secretary of the Interior could under his authority withdraw a portion of them from allotment, he could withdraw substantially all of them if that seemed in his judgment best, and under the contention of the Government he would be executing an allotment law under

rules and regulations prescribed, when in fact he nullified the law by withdrawing the very lands from allotment which Congress had authorized to be so distributed. The law was to be executed under, not nullified by, rules and regulations. The power to withdraw the land in question cannot be found in the provision that allotments should be certified by the Secretary of the Interior for his action in the one providing for his approval of allotments before patent."

Referring to the Act under which that and this suit are brought, the court says, (p. 293):

"It is manifest that no Indian would have occasion to seek relief under this statute until his right had been denied by the Interior Department. It is certain that the purpose of this statute was to confer substantial rights upon Indian claimants, and yet it is insisted that as allotments must be reported to the Secretary of the Interior for his approval the absence of his approval would defeat the suit, when of course no one would want to bring a suit if he had that approval. * * * A strong argument is made tending to show that power should be vested in the President or some other officer of the Government to withhold from allotment lands specially needed for the use of the tribe as a whole, but such argument should be addressed to Congress rather than to the Courts. If such a law would be wise that is no reason why an executive department should make one, or the courts sustain it in doing so."

Henry Gas Co. vs. United States, 191 Fed. 132:

"It is true that the Secretary of the In-

terior may prescribe reasonable rules and regulations not inconsistent with or contrary to the Law of Congress under which allotments shall be made; but this does not authorize him to withhold an allotment altogether from one shown by the rolls to be entitled thereto. *Morrill vs. Jones,* 106 U. S. 466, 27 L. Ed. 267; *Quinn vs. Chapman,* 111 U. S. 445, 28 L. Ed. 476; *United States vs. Symonds,* 120 U. S. 46, 30 L. Ed. 557; *Hartman vs. Warren,* 76 Fed. 157; *Leecy vs. U. S.* 190 Fed. 289. The enrollment within the time required and as of the date fixed determines the right of the citizen to an allotment AND THE FAILURE BEYOND A REASONABLE TIME after its approval by the Secretary of the Interior to make the allotment and issue the proper evidence thereof cannot operate to deprive him of the right thereto."

In *St. Louis Ind. Pack. Co. vs. Houston,* 215 Fed. 559, the Leecy case is cited with approval. The Court says:

> "It is within the power of Congress to vest in executive officers the power to promulgate administrative rules, but this never is deemed to extend to the making of rules to subvert the statute."

See:

Ballinger vs. U. S., 216 U. S. 240, 54 L. Ed. 464;
Wood vs. Gleason, 140 Pac. 418;
Garfield vs. Goldsby, 21 U. S. 249, 53 L. Ed. 168.

In the case of *United States vs. Paine Lumber*

Co., 206 U. S. 467, 51 L. Ed. 1139, the decision of the Circuit Court which held the Munsee Indians had the right to cut and sell timber from allotments for which no patents had been issued was affirmed.

From the adjudicated cases it would seem the refusal to allot land upon which merchantable timber is growing is an attempted innovation, wholly without law or precedent. Appellant's brief fails to point out, and Appellee does not know why or under what authority he is excluded for years from lands sorely needed for a home.

In *Bonnifer vs. Smith,* 166 Fed. 846, it was held rights to an allotment date from the time selection is made. In the same case in the lower court, 154 Fed. 883, it was held that all the Indians are entitled to participate in allotments.

See also, *Oaks vs. U. S.,* 172 Fed. 305.

Appellee testified through an interpreter as follows (R. 35):

> "The plaintiff has supported his family on fishing and seal hunting, but those things are all played out, and in a few years they don't know what they are going to do. The Indians used to hunt sea otter years ago, but that is all gone. These big purse seine companies have gotten so thick now that the Indians' fish that used to

> be in the water are pretty nearly all destroyed, and the white people have fished out the Quileute River that runs down by their reservation. Plaintiff feels sure he can support his family if given the right to that land."

Our first territorial governor was killed in the battle of Chantilly in the War of the Rebellion. His promises solemnly made to and relied upon by these people have not been kept. They sacrificed millions of acres of the same character of land relying upon the faith of a solemn treaty. For sixty-six years these hardy people have watched the tides of the Pacific and the years come and go, but the Great Father at Washington has been unmindful of the promises of the dead governor killed in action while honorably serving his country at the head of his troops.

When suit is finally brought by one of these people in a court of equity to obtain his rights, a wholly illegal, unjust makeshift of a defense is interposed.

The approval of this court should be added to the decree of the trial court awarding Appellee justice long delayed.

Respectfully submitted,

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